Tan Cheng Yam v Emperee Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5–22–1690–1991
KAMALANATHAN RATNAM JC
24 FEBRUARY 1997

Contract *— Void contract — Sale and purchase agreement for sale of shares — Company charged for selling time-sharing memberships illegally — Whether sale and purchase agreement for sale of the shares illegal, void and unenforceable — Whether there was failure of consideration — Whether purchaser entitled to restitution — Companies Act 1965 s 363(3) — Contracts Act 1950 ss 24, 26 & 66*

Contract *— Guarantee — Guarantor's liability — Whether knowledge of guarantor's position as nominee estopped claim against guarantor —Whether guarantor signed guarantee as nominee or in his individual personal capacity*

The plaintiff owned shares in a company called Magnacasa Holdings Sdn Bhd ('MHSB'). Prior to the incorporation of MHSB, there was in existence a company known as Magnacasa Sdn Bhd ('MSB'). The business of MSB was in the sale to the public of time-shares for use of holiday resorts in Malaysia. MSB underwent a corporate restructure in which MHSB was created as an investment holding company to contain the activities of MSB. A company called Traz Sdn Bhd in which the second defendant was a 50% shareholder became the majority shareholder of MHSB. The third defendant was appointed to the board as a nominee of the second defendant.

On 6 March 1991, the plaintiff entered into an agreement with the first defendant to sell his shares in MHSB. Upon execution of the said agreement, the second defendant paid RM100,000 and it was a term of the agreement that the balance sum was to be paid to the plaintiff by five monthly instalments. The second and third defendants jointly guaranteed the payment of the balance sum. Five post-dated cheques were given to the plaintiff. In August 1991, the plaintiff and MSB were charged in the sessions court in relation to the sale of the time-share to the public under s 363(3) of the Companies Act 1965 ('the Act') in which MSB was convicted. On 12 August 1991, the plaintiff received a letter from the first defendant stating that it had stopped payment of the last two cheques because 'the legality of MSB is now in question in court'. The plaintiff commenced proceedings against all three defendants. The issue to be determined was whether the agreement dated 6 March 1991 was void and unenforceable having as its object or part of its object an unlawful purpose contrary to the provisions of ss 24 and 25 of the Contracts Act 1950. If it was, whether the first defendant was entitled to restitution in respect of the monies paid under the agreement, pursuant to s 66 of the Contracts Act 1950.

The first and second defendant submitted that here had been misrepresentation by the plaintiff and that the purpose of the agreement was for the acquisition of the only business of MHSB, namely the carrying on of unlawful sale of time-shares. It was

submitted that s 363(3) of the Act shows that the act of selling shares to the public is prohibited and that it is clearly enacted for the protection of the public. It was also contended that the unlawfulness of the agreement was discovered subsequent to its execution and that the first defendant was entitled to restitution of the monies paid under the agreement. The third defendant contended, inter alia, that the plaintiff's knowledge of the third defendant's position as a nominee raised an estoppel against the plaintiff from making the claim based on the guarantee against the third defendant .

Held, allowing the plaintiff's claim against all three defendants:

(1) The evidence clearly showed that the defendants knew or ought to have known of the state of the company at the time they entered into the agreement. In the circumstances, the allegations of misrepresentation must fail (see p 284E–H).

(2) It was clear that as the law stood then, the time-sharing scheme which came under Pt IV Div 5 of the Act was a prohibited enterprise. However, nowhere in the relevant section, ie s 363, or anywhere in the Act, is there a stipulation that a company which is charged under that section should cease operations. Notwithstanding the fact that the company had done something prohibited by law, the fundamental root of the contract, ie the transfer of shares in the company, was not affected, as the company did not cease to exist and the contract was still enforceable. As long as the company was not required by law to cease operations, there was no failure of consideration. As long as there is no failure of consideration, the mere fact that the defendants formed the opinion that the company was no longer viable, was not a defence. Any agreement executed or made in the ordinary course of business between two parties must be presumed as intended to be legally binding.

Therefore, although MSB was charged for selling time-sharing memberships without the prospectus, illegally, the defendants could not assume that this should render the present agreement unenforceable. The sale and purchase agreement for the sale of the shares between the plaintiff and the first defendant was not illegal and there had been no suggestion that that agreement was illegal. The contract for selling the time-sharing membership was a separate matter and was severable even if it was illegal. The legislature did not, because of s 363(3) of the Act, intend to preclude the company from proceeding with the operation of the company. The offence committed by the company was a strict liability offence, and in the circumstances, the contract was not automatically rendered illegal as performed merely because some statutory requirement had been violated in the course of its completion (see pp 285H–I, 286A–B, G–H and 287D–E).

(3) From the evidence, it was apparent that the defendants never availed themselves of sub-s (7) of s 363 of the Act. By their

failure to exercise their rights pursuant to this subsection, the defendants had, by their default, acquiesced to the rights of the plaintiff. When a party has a legal means of enforcing his right at the earliest instance but refused to do so either through ignorance or indolence, this court will not lend its benign hand to the same defendant for crying foul on a later date when he awakes from his slumber (see p 286C–G).

(4) In the light of the amendments made to s 84 of the Act with regard to the word 'interest', the arguments of the defendants that the time-sharing concept was against public policy could no longer prevail (see p 288H).

(5) The arguments of the third defendants were neither pleaded nor proved in evidence. In any case, the conduct of the third defendant in all matter and in his dealings with the plaintiff ought to preclude his reliance on estoppel. He signed the guarantee not as a nominee but in his individual personal capacity. The guarantee was plain and simple and ought to be given its simplistic interpretation (see p 289B–C).

[Bahasa Malaysia summary

Plaintif memiliki saham-saham dalam sebuah syarikat bernama Magnacasa Holdings Sdn Bhd ('MHSB'). Sebelum pertubuhan MHSB, sebuah syarikat yang dikenali sebagai Magnacasa Sdn Bhd ('MSB') telah wujud. Perniagaan MSB adalah dalam jualan kongsi masa untuk penggunaan tempat peranginan di Malaysia kepada masyarakat awam. MSB telah menjalani penyusunan semula perbadanan dalam mana MHSB dicipta sebagai sebuah syarikat pemegangan pelaburan untuk menguruskan kegiatan-kegiatan MSB. Sebuah syarikat bernama Traz Sdn Bhd dalam mana defendan kedua merupakan pemegang saham sebanyak 50% menjadi pemegang saham majoriti MHSB. Defendan ketiga dilantik kepada lembaga sebagai penerima namaan defendan kedua.

Pada 6 Mac 1991, plaintif mengikat suatu perjanjian dengan defendan pertama untuk menjual saham-sahamnya dalam MHSB. Apabila perjanjian tersebut dilaksanakan, defendan kedua telah membayar RM100,000 dan ia adalah suatu terma perjanjian bahawa jumlah baki harus dibayar kepada plaintif melalui lima bayaran ansuran bulanan. Defendan kedua dan ketiga menjamin bayaran jumlah baki secara bersama. Lima cek tarikh tertunda telah diberikan kepada plaintif. Pada bulan Ogos 1991, plaintif dan MSB dipertuduhkan di mahkamah sesyen berhubung dengan jualan kongsi masa kepada masyarakat awam di bawah s 363(3) Akta Syarikat 1965 ('Akta tersebut') dalam mana MSB disabitkan. Pada 12 Ogos 1991, plaintif telah menerima sepucuk daripada defendan pertama dengan menyatakan bahawa ia telah memberhentikan bayaran dua cek yang terakhir kerana 'kesahan MSB kini dipersoalkan di mahkamah'. Plaintif memulakan prosiding terhadap ketiga-tiga defendan. Isu untuk ditentukan adalah sama ada perjanjian bertarikh 6 Mac 1991 adalah

batal dan tidak boleh dikuatkuasakan kerana mempunyai tujuan yang tak sah yang bertentangan dengan peruntukan ss 24 dan 25 Akta Kontrak 1950 sebagai objeknya atau sebahagian objeknya. Andainya demikian, sama ada defendan adalah berhak mendapat restitusi berkenaan dengan wang yang dibayar di bawah perjanjian, menurut s 66 Akta Kontrak 1950.

Defendan pertama dan kedua menghujahkan bahawa terdapat salah nyata oleh plaintif dan bahawa tujuan perjanjian adalah untuk pengambilan perniagaan tunggal MHSB, iaitu menjalankan jualan haram kongsi masa. Ia dihujahkan bahawa s 363(3) Akta tersebut menunjukkan bahawa tindakan menjual saham kepada masyarakat awam adalah dilarang dan bahawa ia jelas digubalkan untuk perlindungan awam. Ia juga dihujahkan bahawa kepenyalahan perjanjian diketahui selepas pelaksanaannya dan bahawa defendan pertama adalah berhak mendapat restitusi wang yang dibayar di bawah perjanjian tersebut. Defendan ketiga berhujah, antara lain, bahawa pengetahuan plaintif tentang kedudukan defendan ketiga sebagai penerima namaan membangkitkan estopel terhadap plaintif daripada membuat tuntutan berdasarkan gerenti terhadap defendan ketiga.

Diputuskan, membenarkan tuntutan plaintif terhadap ketiga-tiga defendan:

(1) Keterangan jelas menunjukkan bahawa defendan-defendan tahu atau sepatutnya tahu tentang keadaan syarikat sewaktu mereka mengikat perjanjian. Dalam keadaan-keadaan ini, pengataan mengenai salah nyata mesti gagal (lihat ms 284E–H).

(2) Adalah jelas bahawa mengikut undang-undang pada masa itu, skim kongsi masa yang diliputi di bawah Bah IV Div 5 Akta tersebut adalah suatu perusahaan yang dilarang. Namun demikian, tidak ada di mana-mana seksyen yang relevan, iaitu s 363, atau mana-mana dalam Akta tersebut, terdapat penetapan bahawa sebuah syarikat yang dipertuduhkan di bawah seksyen itu patut menghentikan kegiatan. Tanpa mengira hakikat bahawa syarikat tersebut telah melakukan sesuatu yang dilarang oleh undang-undang, dasar asas kontrak, iaitu pemindahan saham-saham dalam kontrak, tidak terjejas, kerana syarikat tersebut tidak terhenti wujud dan kontrak masih boleh dikuatkuasakan. Selagi syarikat tersebut tidak dikehendaki di sisi undang-undang untuk memberhentikan kegiatan, tiada kegagalan balasan. Selagi tiada kegagalan balasan, hakikat bahawa defendan-defendan berpendapat syarikat tidak lagi menguntungkan, bukanlah suatu pembelaan. Sebarang perjanjian yang dilaksanakan atau dibuat dalam perjalanan perniagaan yang biasa di antara dua pihak mestilah dianggap bertujuan mengikat secara sah.

Maka, walaupun MSB dipertuduhkan menjual keahlian kongsi masa tanpa prospektus, secara haram, defendan-defendan tidak boleh beranggapan bahawa ini akan menyebabkan perjanjian

tidak boleh dikuatkuasakan. Perjanjian jual beli untuk jualan saham di antara plaintif dan defendan pertama tidak menyalahi undang-undang dan tiada sebarang cadangan bahawa perjanjian itu adalah haram. Kontrak untuk menjual keahlian kongsi masa merupakan perkara yang berasingan dan boleh diasingkan sekiranya ia adalah haram. Perundangan tidak berhasrat mengecualikan syarikat tersebut daripada meneruskan operasi syarikat disebabkan s 363(3) Akta tersebut. Kesalahan yang dilakukan oleh syarikat adalah kesalahan liabiliti ketat dan dalam keadaan ini, kontrak itu tidak menyalahi undang-undang seperti yang dilaksanakan secara automatik semata-mata kerana sesuatu keperluan stautori telah dilanggar semasa penyelesaian (lihat ms 285H–I, 286A–B, G–H dan 287D–E).

(3) Dari keterangan, adalah nyata bahawa defendan-defendan tidak menggunakan s 363(7) Akta tersebut. Menerusi kegagalan mereka untuk melaksanakan hak-hak mereka menurut subseksyen ini, defendan-defendan telah bersetuju dengan hak plaintif melalui keingkaran mereka. Apabila sesuatu pihak mempunyai cara sah untuk menguatkuasakan haknya seawal mungkin tetapi telah enggan berbuat demikian sama ada melalui kejahilan atau kemalasan, mahkamah ini tidak akan memberi bantuan kepada defendan yang sama jikalau beliau menimbulkan kekalutan pada tarikh yang lain apabila dia sedar akan kesilapannya (lihat ms 286C–G).

(4) Memandangkan pindaan yang dibuat kepada s 84 Akta tersebut berkenaan perkataan 'kepentingan', hujah defendan-defendan bahawa konsep kongsi masa adalah bertentangan dengan polisi awam tidak lagi boleh mengatasi (lihat ms 288H).

(5) Hujah defendan ketiga tidak diplidkan atau pun dibuktikan dalam keterangan. Walau bagaimanapun, kelakuan defendan ketiga dalam semua perkara dan dalam urusannya dengan plaintif sepatutnya mengecualikan pergantungannya pada estopel. Dia telah menandatangani gerenti bukan sebagai penerima namaan tetapi dalam keupayaan peribadi sendiri. Gerenti itu adalah jelas dan patut diberikan tafsiran yang mudah (lihat ms 289B–C).]

Notes

For cases on void contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2295–2310.

For cases on guarantor's liability, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1679–1693.

Cases referred to

Anderson Ltd v Daniel [1924] 1 KB 138 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281 (refd)

Menaka v Lum Kum Chum [1977] 1 MLJ 91 (refd)

Mustafa bin Osman v Lee Chua & Anor [1996] 2 MLJ 141 (refd) A
Shaw v Groom [1970] 2 CB 504 (refd)
St John Shipping Corp v Joseph Rank Ltd [1957] 1 QB 267 (refd)

Legislation referred to

Companies Act 1965 ss 84, 363(3), (4), (5), (7), (9) B
Companies (Amendment)(No 2) Act 1992
Contracts Act 1950 ss 24, 25, 66, 86

Dennis Xavier and *Norhaslinda bte Salleh* (*Xavier Rafie & Norhaslinda*) for the plaintiff.

David Morais, *Azlan Sulaiman* and *PS Khoo* (*PS Khoo & Associates*) for C the first and second defendant.

BB Teh (*Heng & Mogan*) for the third defendant.

Cur Adv Vult

D

Kamalanathan Ratnam JC: The plaintiff owned 98,000 shares in a company called Magnacasa Holdings Sdn Bhd ('MHSB') which amounted to 5% of the equity.

Prior to the incorporation of MHSB, there was in existence a company known as Magnacasa Sdn Bhd ('MSB'). The business of MSB was in the sale to the public of time-shares for use of holiday resorts in Malaysia. E Under the scheme, the subscribing member would pay a membership fee of RM2,000 and thereafter pay a nominal fee for each time he used the particular resort.

A company called Traz Sdn Bhd ('TSB') in which the second defendant was a 50% shareholder owned 51% and one Ng Kok Seng F ('NKS') 44% of MSB. The balance of 5% equity of MSB was held by the plaintiff. In August/September 1990, MSB underwent a corporate restructure in which MHSB was created as an investment holding company to contain the activities of MSB and such other subsidiaries as may be formed in the future. A share swap took place between MSB and MHSB G in which each MSB share was swapped for ten MHSB shares. Thus TSB became a 51% shareholder of MHSB which in turn held the entire equity of MSB.

After TSB became the majority shareholder of MHSB, the third defendant was appointed to the board as a nominee of the second defendant. The second defendant although not on the board, nevertheless created an H executive committee comprising of two, of which he was one, to oversee the board of directors. The second defendant then moved in and acquired an office in MHSB and brought in his own personnel. He also took charge of the development and planning. The second defendant then restructured MHSB. On 6 March 1991, the plaintiff entered into an agreement with I the first defendant to sell his 5% shares in MHSB for a total purchase price of RM480,000. Upon execution of the said agreement, the second defendant paid RM100,000 and it was a term of the agreement that the balance sum of RM380,000 was to be paid to the plaintiff by five monthly instalments

of RM76,000 each. The second and third defendants jointly guaranteed the payment of the balance price of RM380,000 under the agreement. Upon receipt of the initial payment of RM100,000, the plaintiff executed blank transfers and delivered the same with the share certificates and with his letter of resignation from the board of directors, to the second defendant. Five post-dated cheques were given to the plaintiff and the first two instalments of RM76,000 each were cleared. On 28 May 1991, the cheque for the third instalment was dishonoured with the remarks 'payment stopped'. The plaintiff's case is that when he confronted the second defendant, the latter asked for more time and paid RM10,000 and further smaller amounts amounting to RM16,000 leaving a total balance of RM212,000. On 12 August 1991, the plaintiff received a letter from the first defendant stating that it had stopped payment of the last two cheques. It is this letter that forms the substance of the issue. The letter is therefore reproduced:

ESB/032/91
12 August 1991

Mr Tan Cheng Yam
D107, Dayang Puteri Court
Taman Putera
68000 Ampang
Selangor AR Registered

Dear Mr Tan,

Re: Sales & Purchase Agreement

We are writing to inform you that we have stopped payment on the two cheques No 832512 and 832513 for $76,000 each as our board had decided that since the legality of Magnacasa Sdn Bhd is now in question in the courts, it will not be possible for us to proceed with the sale until at least this question has been resolved in the courts.

Since the only business of Magnacasa was the holiday scheme operated by its subsidiary, it was this business which we were interested in acquiring. We hope you will understand our concern and the fact that the whole transaction has changed in nature and the consideration may even have failed completely for the agreement.

Yours faithfully
EMPEREE SDN BHD
Sgd
Authorized Signatory

MHSB was involved in the time-sharing concept. There were numerous other subsidiaries owning valuable properties and it was the case of the plaintiff that the value of MHSB was because of its property base.

The defence of the first defendant was that it had entered into the agreement on account of the plaintiff's misrepresentation, inter alia, that MHSB, the holding company, owned shares in a subsidiary company MSB which was doing a lucrative business of selling membership to the public for time-sharing holidays in MSB's holiday resorts. The first

defendant submitted that it was held out by the plaintiff to the first defendant that to take over MSB's business and to control MSB, the first defendant was required to take over MHSB by purchase of the said shares. It was the case of the first defendant that the plaintiff further had held out that the main asset of MHSB was their shares in MSB and the returns to the first defendant and that their investment would be assured from the lucrative business of MSB.

In August 1991, the plaintiff, the third defendant, NKS and MSB were charged in the Sessions Court in Kuala Lumpur in relation to the sale of the time-share to the public under s 363(3) of the Companies Act 1965 ('the Act') punishable under s 363(5) of the same Act. On 9 March 1992, MSB and NKS were convicted by the sessions court and fined RM12,000 each in default four months imprisonment. The plaintiff and the third defendant were released by the same court upon the charges being withdrawn against them.

I agree with the first and second defendants' submissions that notwithstanding the manner in which the defence has been pleaded, there is principally a single issue to be determined in this matter and that is:

> Whether the agreement dated 6 March 1991 is void and unenforceable having as its object or part of its object an unlawful purpose contrary to the provisions of ss 24 and 25 of the Contracts Act 1950.

If the answer is in the affirmative, then the secondary issue is:

> Whether the first defendant is entitled to restitution or compensation in respect of the monies paid under the agreement, pursuant to s 66 of the Contracts Act 1950.

Case for the first and second defendant

The defendants contended that illegality need not be specifically pleaded but that once brought to the attention of the court, the issue of illegality needs investigation. They relied on the judgment of the then Supreme Court in *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281 at p 288 wherein Peh Swee Chin SCJ said:

> When the contract is not ex facie illegal, then on the question of pleadings, there is only one situation where illegality need not be pleaded when the court can still take judicial notice of illegality and refuse to enforce it. The situation is when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality, eg the illegal purpose of the contract, or its illegal consideration, with the presence of all relevant circumstances, see eg *Palaniappa Chettiar v Arunasalam Chettiar* [1959] MLJ 143, *Leong Poh Chin v Chin Thin Sin* [1959] MLJ 246 and *North Western Salt Co Ltd v Electrolytic Alkali Ltd* [1914] AC 461 just to mention a few. The existence of such a situation in the instant appeal is warranted by the facts that emerged in evidence, including affidavit evidence.

A similar finding in more liberal terms was made by the Court of Appeal in *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141 in the judgment of Gopal Sri Ram JCA at p 146 wherein his Lordship said:

A We accept as beyond argument that illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the court before whom the action is being tried, the court, upon being satisfied that the transaction is indeed illegal, is obliged to act upon it. See, *Natha Singh v Syed Abdul Rahman &Anor* [1962] MLJ 265; *Nasib Singh v Ramasamy* [1969] 1 MLJ 211.

B The defendants argued that this court should not limit itself to a determination based on an ex facie legal contract when faced with evidence that the ulterior or collateral purpose of the contract was unlawful. It was pointed out to me that in *Lim Kar Bee,* the Supreme Court was faced with an allegation that an agreement for the sale and purchase of land and a C trust deed subsequently made thereunder, whilst on its face legal, was really a device to avoid payment of estate duty in regard to the land. The court held that as the primary purpose of the scheme (which included the sale and the trust deed) was to avoid paying estate duty, the scheme was illegal and thus came within s 24 of the Contracts Act 1950. As such, the sale agreement and subsequent trust were held unenforceable.

D Turning to the facts of this case, these defendants submitted that the purpose of the agreement was for the acquisition of the only business of MHSB, namely the carrying on of an unlawful sale of time-shares. Through DW1, it became apparent that MHSB had no bank accounts of its own and that the income generated exclusively by MSB was from sale of the E time-shares to the public. In this respect, it was pointed out to me that PW1 and DW1 both confirmed that between RM30,000,000 to RM60,000,000 was collected by MSB from the sale of the shares. It was also in evidence that properties had been purchased with some of these funds but that none of these properties could be shown to have been F purchased by any company properly described as a subsidiary of either MHSB or MSB. The whereabouts of these properties are uncertain. What however is clear is that these properties were never injected into MSB or any subsidiaries of these companies.

It was further submitted on behalf of the first and second defendants that the allegation of the plaintiff that the second defendant took RM500,000 G to purchase lands in Langkawi was clearly unsubstantiated since no claims either civil or criminal had been preferred against the second defendant in respect of this sum. PW2 also confirmed that apart from the time-sharing business there was no other business that MSB was involved in. DW2 also affirmed that after the conviction, MSB only serviced the members until H the monies ran out.

On the next issue, that is, that the business of MSB was unlawful, these defendants relied on *Anderson Ltd v Daniel* [1924] 1 KB 138 wherein Bankes LJ, quoting with approval the decision of Wrenbury LJ, held as follows at p 143:

I ... Upon that point I should like to refer to what Lord Wrenbury, then Buckley J, said in one of the moneylender cases: *Victorian Daylesford Syndicate v Dott* [1905] 2 Ch 624 at p 629: 'The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly

or by implication, by a statute is illegal and cannot be enforced. *I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose, statutes may be grouped under two heads, those in which a penalty is imposed against doing an act for the purpose only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public.* That distinction will be found commented on in numerous cases, including those which have been cited of *Copie v Rowlands* (1836) 3 M &W 149 and *Fergusson v Norman* (1838) 5 Bing NC 76. Parke B in the former case says the question to determine is whether the Act is "meant *merely* to secure a revenue to the city, and for the purpose to render the person acting as a broker liable to a penalty if he does not pay it? or whether *one* of its objects be the protection of the public, and the prevention of *improper* persons acting as brokers?" *If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute and is illegal.' In my opinion that language applies directly to this case. Here the penalty is imposed wholly for the protection of the public, and the purchaser is entitled to take the objection that as the vendors have failed to give the required invoice, the contract of sale is illegal and they cannot sue for the price.* (Emphasis added.)

It was the submission of these defendants that an examination of s 363(3) of the Act shows both that the act of selling shares to the public is prohibited and that it is clearly enacted for the protection of the public. It was urged upon me that by its very terms, s 363(3) aims at protecting the public against persons offering shares for purchase other than those protected by sub-s (4).

With regard to the counterclaim, the first and second defendants submit that unless the parties were in *pari delicto* when they entered into the agreement, the defendant is entitled to succeed on its counterclaim. I was referred to *Menaka v Lum Kum Chum* [1977] 1 MLJ 91 where the Privy Council held at p 94:

> ... Neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete good faith. The contract was 'discovered' to be void only after these proceedings had been started. Section 66 of the Contracts Ordinance therefore applies and both parties before this Board accepted that it does. Section 66 provides as follows:
>
> > 'When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.'
>
> Mohd Azmi J gave effect to s 66 by finding that the advantage which the borrower had received under the contract was the sum of RM20,000 and that he should restore that sum to the appellant. But as he had made two payments of interest amounting together to RM600 the learned judge found that RM600 was an advantage received by the lender and that it should be deducted from the RM20,000 leaving a balance of RM19,400 to be paid by the respondent who now represents the borrower. Leaving aside for the moment the question of whether any interest should also be payable, their Lordship agree with both courts below that the principal sum of RM19,400 should be paid by the respondent to the appellant. In that way effect will be

given to s 66 under which each party is bound to restore any advantage which he has received to the person from whom he received it — see *Govindram Seksaria v Radbone* (1947) LR 74 Ind App 295 at p 303 where Lord Morton of Henryton said:

> 'The result of s 65 of the Indian Contract Act was that, as from the date on which the contract became void, each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale.'

It was urged upon me to hold that the unlawfulness of the agreement was discovered subsequent to its execution, that is on or around 29 May 1991 and that the agreement was effectively terminated in August 1991. It was also pointed out to me that the charge on which the company was convicted related back to February 1989, which was a time before which the first and second defendants had any direct or indirect involvement in MSB or MHSB. In the circumstances, I was asked to hold that the first defendant was entitled to restitution of the monies paid under the agreement totalling RM268,000.

Case for the third defendant

The plaintiff's claim against the third defendant is based upon a letter of guarantee dated 6 March 1991, executed by the third defendant. However, he said in evidence that he executed the said guarantee under various circumstances. He was at all material times a nominee for the second defendant in the board of directors of MHSB and MSB. He was then also the second defendant's nominee shareholder of 1,025,999 shares in TSB which were subsequently transferred to a person or persons not known to the third defendant as he had executed blank transfer forms for those shares and which were retained by the second defendant. He confirmed that TSB was the vehicle that was used by the second defendant to buy into MHSB, and that he was emplaced on the Board of Directors of MHSB and MSB by the second defendant, and that he did not personally have any shareholding in MHSB and MSB, and that the plaintiff accepted the third defendant as a guarantor knowing that he was at all material times the nominee for the second defendant.

Whilst described as the executive chairman of the 'Magnacasa Group of Companies', the third defendant said that he was in fact acting not very independently by reason of his position as a nominee of the second defendant. It was pointed out to me that the plaintiff had indeed admitted to this during cross-examination by the third defendant. The third defendant submitted that the plaintiff clearly knew that he was a nominee for the second defendant and also that the second defendant had agreed to fully indemnify the third defendant should the plaintiff call upon and claim on the said letter of guarantee. By reason of such collateral knowledge and understanding, it was urged upon me to hold that the plaintiff is now estopped from making this claim against the third defendant. Notwithstanding the fact that he had not pleaded estoppel specifically, the third defendant however relied on *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 wherein the Court

of Appeal held that so long as material facts giving rise to a plea of estoppel are raised, there was no need to actually use the term 'estopped' in the pleadings.

Further and alternatively, the third defendant submitted that from the testimony of the plaintiff and the second defendant, it was evident that there were modifications and variations to the original sale and purchase scheme. Since the plaintiff did not lead evidence as to whether the third defendant was aware of or had consented to such changes — which related to the completion date of the transaction coupled with the payment of the balance purchase price — the third defendant relied on s 86 of the Contracts Act 1950 which provided as follows:

> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

It was thus submitted that the third defendant was discharged of his obligation and liability under the letter of guarantee by operation of law.

Findings of the court

Was there misrepresentation by the plaintiff

The evidence clearly showed that the first and second defendants knew or ought to have known of the state of the company at the time they entered into the agreement. The second defendant was the deputy in finance, in an executive committee ('the Exco') in MHSB and together with one Amir Senawi, through their company TSB, owned 51% of the equity of MHSB. PW1 in his examination-in-chief testified that the second defendant owned TSB with one Amir Senawi and prior to TSB becoming a shareholder of MHSB the company was known as MSB. After TSB became the shareholder, the board of directors of MHSB was changed. PW1 also testified that the third defendant was appointed to the Board of MHSB as a nominee of the second defendant. The third defendant confirmed this in his evidence. PW1 also testified that the second defendant although not on the board of directors, had created the Exco and held the position of deputy in finance which evidence stands unrebutted and from the common agreed bundle of documents, his presence in the board meetings in his capacity as Exco member is patently clear. I find as a fact that the second defendant knew about the position of the company. I am fortified in making this finding of fact when I consider the evidence of PW2 who testified that upon restructuring the company, the second defendant brought in his own people, namely Joe Sabastian, Lisa Huang and Tengku Ardy. This was not denied by the second defendant. In the circumstances, the allegations of misrepresentation made by the first and second defendants must fail.

Time sharing scheme and illegality

The second and third defendants, in raising the issue of illegality in respect of MSB, the subsidiary of MHSB, which was charged under s 363(3) to be

read together with s 363(9) of the Act for illegally selling time-sharing holidays scheme, contend that there is a failure of consideration in the agreement.

The arrangement of the Companies Act 1965

For ease of reference, the Companies Act is arranged as Pt I to Pt XII. Each part, which has its main heading, is then further sub-divided into Divisions bearing sub-headings. Each Division then consists of sections relevant to its own sub-heading. Time-sharing scheme therefore falls under Pt IV (Shares, Debentures and Charges). It then comes under Div 5 whose sub-heading is: Interests Other Than Shares, Debenture, Etc and the relevant section is s 84, which is the interpretation section and which defines time-sharing scheme as:

> ... a scheme, undertaking or enterprise —
>
> (a) participants in which are, or may become, entitled to use, occupy or posses, for two or more periods during the period for which the scheme, undertaking or enterprise, whether in Malaysia or elsewhere is to operate, property to which the scheme, undertaking or enterprise relates; and
>
> (b) that is to operate for a period of not less than three years.

It is also relevant to reproduce s 363(3) and (9) of the Act:

Section 363(3):

> (3) A person shall not make an offer to the public or to any member of the public (not being a person whose ordinary business it is to buy or sell shares, whether as principal or agent) of any shares for purchase.

Section 363(9):

> (9) In this section —
>
> 'shares' means shares of a corporation whether a corporation in existence or to be formed and includes debentures and units and (without affecting the generality of the expression 'debentures') all such documents (including those referred to as 'bonds') as confer or purport to confer on the holder thereof any claim against a corporation, whether the claim is present or future or certain or contingent or ascertained or sounding only in damages and also includes any interest to which Div 5 of Pt IV applies.

Clearly therefore as the law stood then, the time-sharing scheme which came under Pt IV Div 5 was a prohibited enterprise.

However, nowhere in the relevant section, ie s 363, or anywhere in the Act, is there a stipulation that a company which is charged under that section should cease operations. It would be ludicrous to argue that every time a company does something prohibited by the law, it should cease operations. It is my judgment that notwithstanding the fact that the company had done something prohibited by law, the fundamental root of the contract, ie the transfer of shares in the company, is not affected, as the company did not cease to exist and the contract is still enforceable. As long as the company was not required by law to cease operations, there is no

failure of consideration. In my view, as long as there is no failure of consideration, the mere fact that the first and second defendants formed the opinion that the company was no longer viable, is not a defence. So long as consideration is adequate, this court will not enquire into the sufficiency of it. It is not for this court to denounce a contract, happily entered into by the parties, and to say it is unfair. Any agreement executed or made in the ordinary course of business between two parties must be presumed as intended to be legally binding. If the essential elements of a bargain are present, the court will not balance the one side against the other. The parties are presumed to be capable of appreciating their own interests and of reaching their own equilibrium. At this juncture, it is imperative that I look at sub-s (7) of s 363 of the Act which reads:

> (7) Where any person is convicted of having made an offer in contravention of this section, the court before which he is convicted may order that any contract made as a result of the offer shall be void and may give such consequential directions as it thinks proper for the repayment of any money or the retransfer of any shares; and an appeal against the order and any consequential directions shall lie to the court.

From the documentary evidence adduced through the common agreed bundle of documents and from the oral evidence of the witnesses, it is apparent that the defendants in this case never availed themselves of this subsection. Surely the defendants who had clear knowledge of the prosecution ought to have made representations under the subsection to the court that found the defendants guilty under s 363(3) of the Act. Since no representations were made to the sessions court, the said court on its own volition did not make any order under this subsection.

It is my finding that the first and second defendants by their failure to exercise their rights pursuant to this subsection had by their default, acquiesced to the rights of the plaintiff in this case. When a party has a legal means of enforcing his right at the earliest instance but refused to do so either through ignorance or indolence, this court will not lend its benign hand to the same defendant for crying foul on a later date when he awakes from his slumber.

It is my finding that although MSB was charged for selling time-sharing memberships without the prospectus, illegally, the defendants herein cannot assume that this should render the present agreement unenforceable. The sale and purchase agreement for the sale of the shares between the plaintiff and the first defendant is not illegal and there has been no suggestion that that agreement is illegal. The contract for selling the time-sharing membership is a separate matter and is severable even if it is illegal. In *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, the Merchant Shipping Act 1932 forbade the loading of a ship to such an extent that the loadline becomes submerged. A penalty is imposed for breach of the statute. The master of the plaintiff's ship, which had been chartered to an English firm for the carriage of grain from a port in Alabama to England, put into a port in the course of the voyage and took on bunkers, the effect of which was to submerge the loadline contrary to the Act. The master was prosecuted in England for the offence and was

fined £1,200. The defendants, to whom the ownership of part of the goods had passed, withheld part of the freight due, contending that the plaintiffs could not enforce a contract which they had performed in an illegal manner. Devlin J rejected this contention and held that the illegal loading was merely an incident in the corpus of performance that did not affect the core of the contract. Again in the case of *Shaw v Groom* [1970] 2 CB 504, a landlord sued his tenant for arrears of rent amounting to £103 due in respect of a weekly tenancy. The tenant contended that the action must fail, since the rent book issued to him by the plaintiff did not contain all the information required by the Landlord and Tenant Act 1962. Such a default was punishable by a fine not exceeding £50. The Court of Appeal dismissed this contention. The contract was not to be stigmatized as illegal in its performance. The intention of the legislature was that non-compliance with the statutory requirement should render the landlord liable to a fine, not that it should deny him access to the court. Unless this limited construction was placed upon the Act, the result might well be that the landlord would forfeit a sum far in excess of the maximum fine.

I therefore find that the legislature did not, because of s 363(3) of the Act, intend to preclude the company from proceeding with the operation of the company. The offence committed by the company is, I find, a strict liability offence, and in the circumstances, the contract is, in my view, not automatically rendered illegal as performed merely because some statutory requirement has been violated in the course of its completion.

The submission of the first and second defendants that s 363(3) is enacted for the protection of the public needs a second look.

Section 363(4) of the Act reads as follows:

> (4) Subsection (3) shall not apply —
>
> (a) where the shares to which the offer relates are shares of a class which are quoted on, or in respect of which permission to deal has been granted by, any prescribed Stock Exchange and the offer so states and specifies the Stock Exchange;
>
> (b) where the shares to which the offer relates are shares which a corporation has allotted or agreed to allot with a view to their being offered for sale to the public and the offer is accompanied by a document that complies with all enactments and rules of law as to prospectuses;
>
> (c) to any application for shares in or debentures of a corporation or to any invitation to deposit money with or lend money to a corporation which is issued circulated distributed or made subject to and in accordance with Division 1 of Part IV;
>
> (d) where the offer relates to —
>
> (i) an interest to which Division 5 of Part IV applies and is accompanied by a statement in writing as required by that Div; or
>
> (ii) deposits or loans to a corporation of the kind referred to in s 38(6); or
>
> (e) to any advice as to the price at which a management company is prepared to buy or sell any interest to which Division 5 of Part IV applies given or sent by the management company to any person to

whom the management company has given or sent a statement in writing relating to that interest which complies with that Division within the period of six months immediately preceding the giving or sending of the advice.

Section 84 has since been amended by the Companies (Amendment) (No 2) Act 1992 ('Act A836') with regard to the interpretation of the word 'interest'. Since Act A836, interest is defined thus:

(it) means any right to participate or interest, whether enforceable or not and whether actual prospective or contingent —

(a) in any profits assets or realization of any financial or business undertaking or scheme whether in Malaysia or elsewhere

(b) in any common enterprise whether in Malaysia or elsewhere in which the holder of the right or interest is led to expect profits rent or interest from the efforts of the promoter of the enterprise or a third party; ...

[(c) in any time-sharing scheme; or and]

[(d)] in any investment contract,

whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include —

[(e)] any share in or debenture of a corporation'

[(f)] any interest in or arising out of a policy of life insurance; or

[(g)] any interest in a partnership agreement unless the agreement–

(i) relates to an undertaking, scheme, enterprise or investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar undertakings, schemes, enterprises or investment contracts, whether or not that person is a party to the agreement; or

(ii) is an agreement, or is within a class of agreements, prescribed by regulations for the purposes of this paragraph;]

['time-sharing scheme' means a scheme, undertaking or enterprise —

(a) participants in which are, or may become, entitled to use, occupy or possess, for two or more periods during the period for which the scheme, undertaking or enterprise, whether in Malaysia or elsewhere is to operate, property to which the scheme, undertaking or enterprise relates; and

(b) that is to operate for a period of not less than three years.]

In the light of these far reaching amendments, it is obvious that Parliament has had second thoughts about out-lawing time-sharing schemes. Whilst it is not my lot in the present proceedings to find if the word 'interest' as defined in s 84 of the Act read together with s 363(4) of the Act would now legalize time-sharing concepts, suffice it to say that the arguments of the first and second defendants that the time-sharing concept is against public policy can no longer prevail.

The third defendant's arguments can be summarized as follows:

(a) that the plaintiff's knowledge of the third defendant's position as a nominee raised an estoppel against the plaintiff from making the claim against the third defendant.

(b) that the plaintiff knew that the second defendant had agreed to indemnify the third defendant should the plaintiff make a claim on the guarantee.

(c) the modifications and variations to the original sale and purchase scheme without the knowledge and consent of the third defendant raised the defence of s 86 of the Contracts Act 1956.

It is my finding that none of these arguments were pleaded, let alone proved in evidence. In any case, the conduct of the third defendant in all matter and in his dealings with the plaintiff, ought to preclude his reliance on estoppel. He signed the guarantee not as a nominee but in his individual personal capacity. The guarantee is plain and simple and ought to be given its simplistic interpretation. If there is indeed any indemnity provided by the second defendant, the third defendant can no doubt claim such indemnity against the second defendant.

In the circumstances, I had no hestitation in allowing the plaintiff's claim against all three defendants with interest at 8% pa from 9 December 1991 to date of realization and costs. I also dismissed the first and second defendant's counterclaim with costs.

Order accordingly.

Reported by Jafisah Jaafar